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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. A-852

HERMAN CHANEN, MILLER B. LEE
and M. L. VANLANDINGHAM,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arthur P. Greenfield
Daniel J. McAuliffe
3100 Valley Center
Phoenix, Arizona 85073
-and-
Grant B. Cooper
Phyllis N. Cooper
1880 Century Park East
Los Angeles, California
90067
Attorneys for
Herman Chanen

Harry A. Stewart, Jr.
3440 North 16th Street,
Suite 8
Phoenix, Arizona 85016
Attorneys for Miller B. Lee

Mark B. Sandground
1025 Connecticut Avenue,
N.W.
Washington, D.C. 20036
Attorneys for
M. L. Vanlandingham

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Petitioners Herman Chanen, Miller B. Lee and M. L. Vanlandingham hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-15a) is reported at 549 F.2d 1306. The district court issued no written opinion.

JURISDICTION

The judgment and opinion of the court of appeals were issued on February 3, 1977, (App. A, *infra*, pp. 1a-15a). A timely petition for rehearing was denied, and a companion suggestion of the appropriateness of rehearing *en banc* rejected, by order of the court of appeals, on March 28, 1977. (App. B., *infra*, p. 1b). By Order dated April 18, 1977, Mr. Justice Rehnquist extended the time for filing a petition for writ of certiorari until May 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Federal district court is without power or authority to dismiss a criminal indictment, subject to appellate review for abuse of discretion, when it has determined that evidence was presented to a Federal grand jury by the United States in a fashion that deprived that body of the opportunity to make an independent assessment of the basis of the government's charges and was fundamentally unfair to the defendants eventually charged.

2. Whether the doctrine of "separation of powers" insulates from judicial scrutiny the prosecutor's conduct of grand jury proceedings and precludes judicial intervention, even when necessary to protect the rights of persons to be charged with criminal conduct.

STATEMENT

This case concerns the propriety of the dismissal of a superseding indictment charging petitioners with conspiracy to make and making false statements before a department or agency of the United States. The circumstances under which this indictment was secured form the crux of the controversy.

Petitioners are all former officers and employees of National Housing Industries, Inc. (NHI), a now inactive corporation formerly engaged in the business of general construction contracting in Phoenix, Arizona. On May 20 and June 12, 1974, the United States presented, to a Federal grand jury sitting in Phoenix, evidence concerning charges that the petitioners had submitted, or participated in the submission of, false statements in connection with a claim that had been submitted by NHI to the United States Air Force for an increase in the amount of a contract for the construction of certain housing units at Williams Air Force Base.

The evidence presented to this grand jury in 1974 took the form of live testimony from an agent of the Federal Bureau of Investigation (FBI) and from four witnesses who had percipient knowledge of the facts and circumstances surrounding the submission of the claim and/or the making of the allegedly false statements. For reasons which do not affirmatively appear of record, no indictment was returned by this initial grand jury. Thereafter, the matter remained dormant for a period of sixteen months.

On October 15, 1975, the government sought and secured, from a second and different grand jury, an indictment charging petitioners with violations of 18 U.S.C. §§ 2, 371 and 1001. Proceedings before this second grand jury were not reported but consisted, the district court was subsequently informed, solely of testimony from an FBI agent, which included a summary

of the live testimony before the initial grand jury. No showing has ever been made that those witnesses called before the initial grand jury were unavailable for appearance before the second grand jury. Upon motion of the defendants, the district court dismissed this indictment with an oral opinion that noted that the grand jury had been deprived of the opportunity to assess the credibility of the government's witnesses (two of whom were admitted perjurers) and suggested strongly to the government prosecutor that the same course not be followed if the matter were to be pursued.

The matter was pursued, but the district court's admonition went unheeded. Although the witnesses who had appeared before the initial grand jury in 1974 were available for testimony, the government summoned, as its sole witness before yet a third and different grand jury, an FBI agent who read to that body transcripts of the testimony secured from these witnesses in 1974. On the basis of this presentation, the government sought and secured a second, superseding indictment, which was again dismissed upon motion of the defendants. In dismissing the second indictment, the district court orally ruled that the government had failed to comply with its prior ruling, that "under the totality of the circumstances" the grand jury had been deprived of an adequate opportunity to assess the basis of the government's case, and that the entire procedure had been fundamentally unfair to the defendants. The United States appealed from this dismissal.

The court of appeals reversed. Grounding its opinion on the "separation of powers" doctrine, the court ruled that the conduct of the prosecutor involved had not been "sufficiently egregious to require dismissal" (App. A, *infra*, p. 4a), and that the district court had "overstepped the bounds of his authority" and "improperly interfered with decisions within the domain of the prosecutor." (App. A, *infra*, p. 4a.) A timely petition for rehearing was denied by order entered on March 28, 1977. (App. B, *infra*, p. 1b.) By Order dated April 18, 1977, Mr. Justice Rehnquist extended the time for filing the present petition until May 23, 1977.

REASONS FOR GRANTING THE WRIT

In attempting to define the proper role of the Federal judiciary in preserving the integrity of the grand jury process, the decision below enunciates a standard that is unduly restrictive of the judicial role in preserving the acknowledged values of the grand jury system. More importantly, the decision improperly invokes the "separation of powers" doctrine as a basis for limiting, and compromising, judicial freedom to strike a proper balance between individual rights and inflated claims of prosecutorial prerogative; on this ground alone, it warrants consideration by this Court. More significantly, the court below's narrow definition of the bounds of judicial authority and discretion in this area conflicts directly with the stated views of the United States Court of Appeals for the Second Circuit on this very subject:

1. Throughout the proceedings below, petitioners' argument was, and remains, that, in furtherance of the exercise of its supervisory authority over the grand jury and of its *obligation* to protect the rights of indi-

vidual criminal defendants, the district court possessed both authority and discretion to dismiss the indictment in question, upon its determination that it had been secured in a fashion that was fundamentally unfair both to the petitioners and to the grand jury. The decision below fails utterly to address this concern, but instead draws upon what it perceives to be "the dynamics of the constitutional scheme of separation of powers" as a basis for concluding that, whatever supervisory power the Federal judiciary may have with regard to grand jury proceedings, that power may not be exercised so as to "encroach[es] on the prerogatives of the prosecutor."

The court's reliance upon the doctrine of "separation of powers" itself evidences a misunderstanding, not only of the petitioners' position, but also of the judicial function in matters of this nature. This case simply does not present the district court functioning as disciplinarian for the prosecutor or for the grand jury. While there are unquestionably cases where such a role must be performed, the present case involves the district court as guardian of the rights of the accused. Thus, it is not without significance that, in deferring to the essentially talismanic invocation of "prosecutorial prerogative," the court of appeals identifies, as those institutions or parties whose respective interests must be weighed, only the court, the prosecutor and the grand jury. This "institutional analysis" wholly fails to consider perhaps the most important set of interests involved—those of the individuals against whom the government desires to institute criminal charges of a serious nature.

The inclusion in the Bill of Rights of a requirement that no person may be required to defend serious criminal charges except upon indictment by a grand jury was not, as one court has noted, "a mere verbal exercise." *United States v. Estepa*, 471 F.2d 1132, 1136 (2nd Cir. 1972). Rather, the grand jury institution, and its incorporation into the Fifth Amendment, spring from recognition of the need to insure that criminal charges not be instituted without the safeguard of a meaningful and independent scrutiny of their underlying basis. This Court has repeatedly reminded us that:

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

Cf. also, Stirone v. United States, 361 U.S. 212, 218 (1960); *Ex parte Bain*, 121 U.S. 1 (1887). Of necessity, the responsibility for insuring that such scrutiny is both independent and meaningful has been that of the judiciary.

That judicial role, of protecting individual rights, cannot properly be limited to the mere preservation of institutional boundaries. Stated another way, neither the "independence of the grand jury" nor the "integrity of the judicial process" are values to be served for their own sake. In a different but related context, this Court has noted that, while our constitutional scheme may dictate certain forms of deference as between the coordinate branches, it can never require the abdication of the judicial function and particularly not of

"the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions . . ." *United States v. Nixon*, 418 U.S. 683, 707 (1974).

When the appropriate range of interests involved in this case are identified and assessed, the proper result is affirmance of the district court's decision. It was satisfactorily demonstrated to the district court that the credibility of the government's witnesses was critical to the question whether a *prima facie* case could be established, that two of the government's witnesses had admitted to perjury on at least one occasion, that one of the witnesses had admitted to yet another material falsehood of which the government was aware, that the grand jury had not been apprised of that fact, and that the grand jury had been deliberately deprived of the opportunity to assess the demeanor and credibility of these witnesses, all for no apparent reason. The district court, taking all these circumstances into account, determined that the procedures employed by the prosecutor, in the exercise of his prerogatives, had been *fundamentally unfair* to both the grand jury and the *defendants*. The United States' only response to the district court's concerns has always been a naked claim of prosecutorial prerogative, unadorned by any explanation of, much less justification for, the procedures employed.

The function of the grand jury today remains: "to stand between the prosecutor and the accused, and to determine whether the charge was founded *upon credible testimony* or was dictated by malice or personal ill-will." *Hale v. Henkel*, 201 U.S. 43, 59 (1906) (emphasis added). Where, as here, the district court has found the credibility of the government's witnesses

to be of critical importance, and their credibility is independently questionable, the denial to the grand jury of the opportunity to observe their demeanor impairs that body's ability to independently assess the basis of the government's charges equally as does the more "egregious" forms of prosecutorial misconduct, and presents no less compelling a case for judicial intervention.

2. Commencing with the admonition that "excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent." *United States v. Umans*, 368 F.2d 725 (2nd Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967), there has evolved, in the decisions of the United States Court of Appeals for the Second Circuit, the rule that the excessive, unnecessary and misleading presentation of hearsay evidence to grand juries constitutes basis for the dismissal of an indictment so secured.

This development culminated in the decision of *United States v. Estepa, supra*, where the court found: "dismissal of the indictment *to be required* because of the nature of the presentation to the grand jury." 471 F.2d at 1133 (emphasis added). *Cf. also, United States v. Arcuri*, 282 F.Supp. 347 (E.D.N.Y.), *aff'd*, 405 F.2d 691 (2nd Cir. 1968), *cert. denied*, 395 U.S. 913 (1969). The *Umans-Estepa* rule has been characterized as "a *supervisory* guideline to be employed by courts *within their sound discretion* to

protect potentially innocent citizens from possible prosecutorial manipulation of grand jury proceedings." *United States v. Cruz*, 478 F.2d 408, 411 (5th Cir. 1973) (emphasis added).

In the view of the district court, this case did not involve the question of the proper application of this Court's decision in *Costello v. United States*, 350 U.S. 359 (1956); nor is that advanced as the point of divergence between the decision below and the cited decisions of the Second Circuit. Rather, there is presented a conflict in principle between the two Circuits as to the breadth of the authority and discretion of the Federal judiciary with respect to grand jury proceedings.

In the instant case, the district court found that the deliberate and unnecessary decision not to present live witnesses before the grand jury effectively deprived that body of the opportunity to meaningfully and independently assess the merits of the government's charges and was fundamentally unfair to the present petitioners. There is noticeably lacking from the opinion below any indication that the district court's determinations were clearly erroneous or that its decision to dismiss the indictment was arbitrary, fanciful, capricious or an abuse of discretion.

To the contrary, the basis for reversal was the court of appeals' ruling that the district court simply lacked authority, much less discretion, to take the action it did. On the other hand, there is implicit in the decisions of the Second Circuit, discussed *supra*, the rule

that, when presented with a proper setting calling for judicial protection of individual rights, a district court has ample authority, if not an obligation, to act.

Quite apart from the need to resolve this decisional conflict, the underlying issue is itself one of sufficient importance to merit this Court's consideration. Perhaps the principal danger of the opinion below is that it assigns to the judiciary altogether too narrow and restricted a role in protecting the rights of individual defendants. Even in discussing the role of the court in controlling prosecutorial misconduct, the court of appeals again confines proper judicial intervention to an exceedingly small class of cases, i.e., those where the conduct in question *requires* dismissal of the indictment. It would appear that the court would countenance an indictment's dismissal only where the prosecutorial transgression was both of consitutional magnitude and "sufficently egregious" to warrant such action.

In *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974), the court observed, with obvious concern, that: "over the years, the government prosecutor has gained substantial influence over the grand jury, and subsequently that institution has lost much of its former independence." The unmistakable message of the decision below is that a conscious and unjustified governmental decision to employ procedures before the grand jury that are fundamentally unfair to all concerned is not "sufficently egregious" to warrant judicial intervention. No decision of this Court countenances, much less sanctions, such a potentially drastic abdication of the judicial function.

CONCLUSION

As noted, the district court in thise case determined that the conduct of proceedings before the grand jury was fundamentally unfair to all interests involved. Petitioners would suggest that sustaining the authority of the district court to dismiss a criminal indictment where such a finding has been made, subject to traditional appellate review for abuse of discretion, will not disrupt the criminal justice system, will better strike the balance between the competing roles of court, prosecutor and grand jury than does the opinion below, and will unquestionably preserve intact the judicial function in safeguarding individual rights. At a time when the continued vitality of the grand jury's theoretical role in our criminal justice system has come under increasing scrutiny, these are questions which compel review by this Court. For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Harry A. Stewart, Jr.
Attorneys for Miller B. Lee

Mark B. Sandground
Attorneys for M. L. Vanlandingham

Grant B. Cooper
Phyllis N. Cooper

and

Arthur P. Greenfield
Daniel J. McAuliffe
Attorneys for Herman Chanen

By _____
Daniel J. McAuliffe

APPENDIX A

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* -vs- HERMAN CHANEN, MILLER B. LEE and M. L. VANLANDINGHAM, *Defendants-Appellees.*	No. 76-2571 OPINION

Appeal from the United States District Court
for the District of Arizona

Before: BARNES and WALLACE, Circuit Judges, and SOLOMON,* District Judge

WALLACE, Circuit Judge:

After the government had twice presented evidence to a federal grand jury and once had an indictment dismissed, a third effort resulted in the return of an indictment charging defendants Chanen, Lee and Vanlandingham with the same violations of 18 U.S.C. § 371, conspiracy to commit an offense against or defraud the United States, and of 18 U.S.C. §§ 1001 and 2, conspiring to make and making false, fictitious or fraudulent statements in a matter before a department

* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

or agency of the United States. Subsequently, however, the district court once again granted the defendants' motion to dismiss the indictment. The government appeals and we reverse.

I

On May 30 and June 12, 1974, the government presented evidence to a grand jury regarding an allegedly false claim made by National Housing Industries, Inc. (NHI) and several of its officers—Chanen, Lee and Vanlandingham—against the United States in the Court of Claims. The evidence consisted of the live testimony of five witnesses: Theodore P. Crowley, the FBI agent who conducted the investigation into the NHI claim; Richard Lewis, a former NHI employee who submitted an affidavit in support of the claim; Dewey Trawick, a former NHI employee who also was involved in the alleged conspiracy; Donald Ragsdale, another former NHI employee; and Marilyn Boice, a notary public who notarized the signatures on the affidavits presented in support of the NHI claim. It appears that the government at that time neither drafted and presented an indictment to the jury nor requested that the jury return a true bill. The jury did not vote on the matter. Subsequently, the grand jury was discharged.

There were no further proceedings until October 15, 1975, when the government requested and received from a second and different grand jury an indictment charging the defendants with violating 18 U.S.C. §§ 371, 1001 and 2. The second grand jury returned the indictment after hearing the testimony of agent Crowley. As part of his presentation, Crowley summarized the testimony of the witnesses given before the

first grand jury. He also presented documentary evidence regarding the charges and answered questions.

On the defendants' motion, the district court dismissed the indictment. The court apparently based the dismissal on two grounds: First, no court reporter was present at, and hence no transcript was made of, the proceedings before the second grand jury. Second, the government did not "even make any effort to present the evidence presented to the first grand jury. It's entirely hearsay before the second grand jury by the investigating FBI agent."

On April 15, 1976, with a court reporter present, a government officer read the transcripts containing the testimony given before the first grand jury to a third and different grand jury.[1] Agent Crowley also presented documentary evidence and responded to questions from jurors. The third jury returned a true bill charging the defendants with violations of 18 U.S.C. §§ 371, 1001 and 2.

The defendants moved to dismiss the second indictment, and the motion was granted. In support of his decision to dismiss, the district judge, after reviewing the procedural history of the case outlined here, stated that "the grand jury is entitled to learn what the Government has to offer and evaluate it on that basis. And as long as the Government presented their case live before that [the first] grand jury, I think any subsequent grand jury should have the same opportunity."

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[1] Because the testimony of Marilyn Boice before the first grand jury was deemed unhelpful, it was not read to the third grand jury.

The judge made it clear that, in his view, the dismissal was not based on the use of hearsay evidence before the grand jury.

II

Two considerations lead us to the conclusion that the district court improperly dismissed the indictment. First the facts and holdings of the cases dealing with this issue demonstrate rather plainly that the prosecutor's action here falls far short of the type of conduct which has been held sufficiently egregious to require dismissal of the indictment. Second, our view of the respective roles of the Executive (prosecutor) and Judicial (district court) branches of the federal government with respect to the grand jury convinces us that by dismissing the indictment the district judge overstepped the bounds of his authority and improperly interfered with decisions within the domain of the prosecutor.

A.

On occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury. *See, e.g., United States v. Estepa*, 471 F. 2d 1132 (2d Cir. 1972); *United States v. Wells*, 163 Fed. 313 (D. Idaho 1908); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), *appeal docketed*, No. 75-3824, 9th Cir. Dec. 29, 1975; *United States v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975). These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers. *See generally United States v. Basurto*, 497 F. 2d 781 (9th Cir. 1974); *id.* at 793 (Hufstedler, J., concurring); *United States v. Estepa*,

supra, 471 F. 2d 1132.[2] Whatever the basis of the dismissal, however, the courts' goal has been the same, "to protect the integrity of the judicial process," *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969), particularly the functions of the grand jury, from unfair or improper prosecutorial conduct.[3]

Almost every court dealing with the issue raised here has confronted a novel set of facts. The range of prosecutorial conduct capable of inspiring allegations of unfairness appears unlimited. Indeed, the facts of this case are unlike those of any other we have been able to find. Nevertheless, a review of the cases, with particular regard for their facts, serves to define the line between prosecutorial conduct which is inimical to "the integrity of the judicial process" and conduct which does not require dismissal of the indictment.

United States v. Wells, supra, 163 Fed. 313, involved flagrantly abusive prosecutorial conduct. The prosecutor entered the grand jury room during that body's deliberations. When requested to leave by one

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[2] Counsel for defendants emphasized at oral argument that they did not base their claim on constitutional due process considerations but on concepts of "fundamental unfairness" and hence we presume, on the court's supervisory powers.

[illegible]his reason, we reject the government's contention that [illegible] this case is whether the evidence presented to the [illegible]y was sufficient—quantitatively and qualitatively—to [illegible]e indictment. *See* United States v. Basurto, 497 F.2d 781, [illegible].l. (9th Cir. 1974), where we likewise identified the issue "not [as] one relating to the sufficiency of the evidence before a grand jury to sustain an indictment, but rather" one relating to the prosecutor's conduct in the discharge of his duties to the grand jury, the court and the defendant.

of the jurors, he refused. He then expressed to the jury his personal opinion that the evidence established the guilt of the defendants and urged the grand jury to indict. As part of his address, he stated that the Department of Justice in Washington, D.C., had initiated the investigation and now wanted the indictment and that therefore the grand jury had a duty to indict. He also commented on the "forgetfulness" of the defendants in their testimony before the grand jury. In short, "the [prosecutor's] address was a plea for an indictment, substantially in manner and form as a prosecuting officer would plead for the conviction of defendants before a trial jury." *Id.* at 322. This address, coupled with the prosecutor's demand on the foreman to sign the indictment and his brutal, badgering questioning of the defendants-witnesses, led the court to quash the indictment.

In *United States v. DeMarco, supra*, 401 F. Supp. 505, an attorney in the Watergate Special Prosecutor's office threatened defendant DeMarco with a new indictment in California if he exercised his venue right to move a pending criminal case from Washington, D.C., to his home district, the Central District of California. The prosecutor was anxious to try DeMarco and a co-defendant together. In effect the venue statutes permitted the defendants to sever their cases. In the face of this threat, DeMarco exercised his statutory right and moved the pending case to California. The prosecutor retaliated by securing a new indictment on an additional charge from a California grand jury. The district court dismissed the new indictment on these grounds:

> [T]he prosecutor did not disclos
> [California] grand jury that the charg
> attacked as an unjustifiable exercise of
> ing power. The grand jury was entit
> apprised of that information [i.e., th
> ment's "venue-bargaining"] so that it c
> an independent judgment as to whet
> appropriate to return an indictment und
> cumstances.
>
> . . . .
>
> In this case, the government did not pre
> mation vital to the grand jury's infor
> independent judgment.

Id. at 513-14.

Both *United States v. Estepa, supra*, 47
and *United States v. Gallo, supra*, 394 F
applied a rule developed by the Second
dismissed indictments because of alleged
and improper prosecutorial use of hears
before the grand jury. That rule has been
by the Fifth Circuit in these terms:

> [A]n indictment based on hearsay is inv
> (1) non-hearsay evidence is readily ava
> the grand jury is misled into believing it
> ing direct testimony rather than hearsa
> there is a high probability that had the g
> heard the eye witnesses it would not
> dicted.

United States v. Cruz, 478 F.2d 408, 410 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973) (citations omitted).[4]

Despite the holdings of these cases, it is clear that the courts have been reluctant to dismiss indictments because of prosecutorial misconduct. *Beatrice Foods Co. v. United States*, 312 F.2d 29, 39 (8th Cir.), *cert. denied*, 373 U.S. 904 (1963). This reluctance is demonstrated by a review of several of the many cases where motions to dismiss were denied. For example, in *United States v. Bruzgo*, 373 F.2d 383 (3d Cir. 1967), the defendant alleged that the prosecutor had threatened a grand jury witness, a business associate of defendant, with imprisonment, a fine and loss of citizenship. The prosecutor also allegedly called the witness a "thief" and a "racketeer." For purposes of its decision, the court took these allegations as true. The court first noted that the prosecutor's comments "exceeded the bounds of proper conduct by prosecutors and . . . their use is to be condemned." *Id.* at 386. Nevertheless, the court concluded "that the conduct of the prosecutors before the grand jury did not under the present facts create a defect of constitutional or legal proportions. It follows that the grand jury proceedings were valid and that there was no error in denying defendant's motion to dismiss the indictment." *Id.* at 387.

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[4] The Fifth Circuit went on with the following observation regarding the Second Circuit's rule:

> However, this "best evidence" rule has never been considered, even by that [the Second] circuit, as a constitutional requirement .... Rather, it serves simply as a supervisory guideline to be employed by courts within their sound discretion to protect potentially innocent citizens from possible prosecutorial manipulation of grand jury proceedings.

478 F.2d at 411 (citations omitted).

In *Laughlin v. United States*, 385 F.2d 287 (D.C. Cir. 1967), the prosecutor, while questioning a witness before the grand jury, made a reference to allegations of the defendant that another witness was a prostitute. The court noted that the record did not reveal when and even if the defendant had ever made such allegations and that the prosecutor's reference therefore "appears to have been injected gratuitously by [the prosecutor] in a way that could have prejudiced [the defendant] unfairly." *Id.* at 292.

> Nevertheless, although we may condemn this incident as bad practice in the abstract, we are not persuaded that the defendants were substantially prejudiced by it. The other competent evidence before the grand jury was ample to support the indictment; and no way does the incident . . . require dismissal of the indictment.

Id.

In *Coppedge v. United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963), the defendant alleged that a witness before the grand jury perjured himself. The court refused to dismiss the indictment because the testimony before the grand jury, excluding the allegedly perjured testimony, showed some competent evidence. Chief Justice (then Judge) Burger correctly noted that

> public officials [i.e., prosecutors] are charged with a high duty to screen out unreliable witnesses but the critical and final place to detect perjury is on trial when the witness must face the accused before the world and expose himself to the rigors of cross examination and other hazards including contempt.

Id. at 132.

In *Loraine v. United States*, 396 F.2d 335 (9th Cir.) *cert. denied*, 393 U.S. 933 (1968), the defendant moved to dismiss the indictment on grounds that the prosecutor, in his presentation to the grand jury, wilfully suppressed evidence that would undermine the credibility of three crucial witnesses before the grand jury. Apparently one witness had a criminal record and was then under indictment in several other cases; another witness had been charged with embezzlement; the last had been enjoined from dealing in securities. We held that

> the trial court did not err in refusing to invalidate a federal indictment because the Government did not produce before the grand jury all evidence in its possession tending to undermine the credibility of the witnesses appearing before that body. Loraine was accorded the full protections of the Fifth and Fourteenth Amendments when, at the trial on the merits, he was permitted to expose all the facts bearing upon his guilt or innocence.

Id. at 339.

Although the holdings of all these cases may be difficult to reconcile, we believe that they make it plain that the manner in which the prosecution secured the indictment in the present case cannot serve as the basis for a dismissal. Reading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute, on the facts of this case, "fundamental unfairness" or a threat to "the integrity of the judicial process." The prosecutor advised the third grand jury that witnesses Lewis and Trawick had previously made statements inconsistent with their

grand jury testimony. Further, their testimony in the transcripts read to the third grand jury contained confessions that they had submitted false affidavits. In light of our decison in *Loraine*, these facts reinforce our conclusion that dismissal is not warranted.

Also, even if we were inclined to follow the Second Circuit's rule regarding the use of hearsay, which we are not, we could not uphold the dismissal. Even if live witnesses had been readily available to testify before the third grand jury, that jury was certainly not misled into believing that it was hearing direct testimony rather than hearsay. Further, given the fact that the prosecutor specifically advised of Lewis' and Trawick's prior inconsistent statements, it seems less than probable that had the grand jury heard live witnesses it would not have indicted. *See United States v. Cruz*, *supra*, 478 F.2d at 410-11.

B.

Even if the action here falls short of the conduct which the courts have held in other instances to require dismissal of the indictment, defendants argue that the district court has a discretionary supervisory power to dismiss the indictment where the court determines that the procedures used by the prosecution to secure the indictment were fundamentally unfair. Accordingly, they argue, the dismissal in this case must be sustained unless it amounts to an abuse of discretion. We believe that the defendants' view of the trial court's discretion is not wholly correct.

In its broadest conceptual outlines, this case presents a conflict between the Executive and Judicial branches of the federal government over their respective relationships to the federal grand jury. The defendants perceive the district court as endowed with broad discretionary powers to supervise the grand jury. By contrast, the government contends that "the manner of conducting grand jury proceedings lies in the discretion of the executive branch guided by law, not in the trial court." In our view, tradition and the dynamics of the constitutional scheme of separation of powers define a *limited* function for both court and prosecutor in their dealings with the grand jury. In this case, it is the court, not the prosecutor, which has exceeded those limits.

In resolving disputes involving district court, prosecutor and/or grand jury, some appellate courts have attempted to pigeonhole the grand jury into one of the three branches of government created by the first three articles of the Constitution. For example, it has been said that the grand jury is essentially an agency of the court, and that it exercises its powers under the authority and supervision of the court. *See United States v. Stevens*, 510 F.2d 1101, 1106 (5th Cir. 1975). On the other hand, it has been asserted that grand juries are basically law enforcement agencies and are for all practical purposes an investigative and prosecutorial arm of the Executive branch of the government. *See In re Grand Jury Proceedings*, 486 F.2d 85, 89-90 (3d Cir. 1973). To the extent that these apparently conflicting statements reflect the view that the functions of the grand jury are intimately related to the functions of court and prosecutor, we have no dis-

agreement with them. That view is irrefutable as a matter of fact. But under the constitutional scheme, the grand jury is not and should not be captive to any of the three branches. The grand jury is a pre-constitutional institution, *see United States v. Calandra*, 414 U.S. 338, 342-43 (1974), given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of the government. "The federal grand jury is a constitutional fixture in its own right . . . . " *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973); *but cf. Brown v. United States*, 359 U.S. 41, 49 (1959).

Respecting the work of the grand jury, both court and prosecutor play supportive and complementary roles. As a practical matter, the grand jury generally relies on the prosecutor to determine what witnesses to call. Also, in practice the prosecutor conducts the examination of the witnesses and otherwise determines what evidence to present before the grand jury. *See* 1 Wright, Federal Practice and Procedure § 101, at p. 152 (1969); 8 Moore's Federal Practice § 6.02[1] (2d ed. 1976); Note, *The Grand Jury as an Investigative Body*, 74 Harv. L. Rev. 590, 596 (1961). In addition, it is the prosecutor who normally prepares the indictment, *see* 8 Moore's Federal Practice § 6.02[2], at p. 6-18 (2d ed. 1976), although of course the grand jury must review the indictment and adopt it as its own. *See Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969). Some of these functions—such as initiating a criminal case by presenting evidence before the grand jury—qualifies as "an executive function within the exclusive prerogative of the Attorney General." *In re Persico*, 522 F.2d 41, 54-55 (2d Cir. 1975). *See gener-*

ally United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

The court, on the other hand, exercises its power to summon witnesses to attend and to give testimony before the grand jury. Also, "it is the court which must compel a witness to testify if, after appearing, he refuses to do so." *Brown v. United States, supra*, 359 U.S. at 49. In addition, the court exercises a form of authority over the grand jury when, for example, it dismisses an indictment for failure to charge all elements of the offense or to warn the defendant fairly of the charge against which he must defend. *See United States v. Wabaunsee*, 528 F.2d 1 (7th Cir. 1975). Likewise, the court exercises authority over the prosecutor when it dismisses an indictment because of prosecutorial misconduct. *See* section II, A *supra*. In light of these functions, it has been said that the "grand jury is subject to a supervisory power in the courts, aimed at preventing abuses of its process or authority." 1 Wright, Federal Practice and Procedure § 101, at p. 151 (1969).

Nevertheless, given the constitutionally-based independence of each of the three actors—court, prosecutor[5] and grand jury—we believe a court may not exercise its "supervisory power" in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the

[5] Our references to the independence of the prosecutor, as an arm of the Executive, are of course made with an awareness of the traditonal concept of the prosecutor as an officer of the court.

> An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first [Continued]

district courts were not required to meet such a standard, their "supervisory power" could readily prove subversive of the doctrine of separation of powers.

Application of this standard to the present case requires reversal. The asserted legal basis for the district court's interference with a standard prosecutorial decision—what evidence to present to the grand jury and how to present it—is the need to preserve the integrity of the judicial process and to avoid any fundamental unfairness. But as noted in section II, A *supra*, it is far from clear that the prosecutor's decision in this case regarding the presentation of evidence to the third grand jury implicates any of those interests.

REVERSED.

> capacity he is responsible to the Court for the manner of his conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but in his second capacity, as an agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment.
>
> Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967).

Also, as we said in an earlier case, the prosecutor owes a duty of good faith to the court, the grand jury and the defendant. United States v. Basurto, *supra*, 497 F.2d at 786.

These two somewhat related concepts do not justify, however, a view of judicial supervisory powers so broad in scope as to risk serious impairment of the consitutionally-based independence of the Executive, i.e., the prosecutor, when acting within his own sphere.

APPENDIX B

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* -vs- HERMAN CHANEN, MILLER B. LEE and M. L. VANLANDINGHAM, *Defendants-Appellees.*	No. 76-2571 ORDER

Before: BARNES and WALLACE, Circuit Judges, and SOLOMON,* District Judge

The panel as constituted above has voted to deny the petition for rehearing; Judges Barnes and Solomon have recommended rejection of the suggestion for rehearing en banc and Judge Wallace has voted to reject the same.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

HERMAN CHANEN, MILLER B. LEE
and M. L. VANLANDINGHAM,
Petitioners,
vs.
UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 20th day of May, 1977, copies of this Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit were mailed, postage prepaid, to the Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530 and to the United States Attorney, District of Arizona, 230 North First Avenue, Phoenix, Arizona 85025. I further certify that all parties required to be served under the provisions of Rule 33 of this Court have been served.

Daniel J. McAuliffe

Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

No. 76-1630

In the Supreme Court of the United States

OCTOBER TERM, 1977

HERMAN CHANEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
PATTY E. MERKAMP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 1306.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1977. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 28, 1977. On April 18, 1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 23, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the manner in which the government presented evidence to the grand jury was so fundamentally unfair as to require dismissal of the indictment.

STATEMENT

On May 30, 1974, a federal grand jury sitting in the United States District Court for the District of Arizona commenced an investigation of an allegedly false claim made by petitioners as officers of National Housing Industries, Inc. ("NHI"), against the United States in the Court of Claims. The grand jury heard the testimony of five live witnesses: F.B.I. Agent Crowley (an accountant and the chief investigator in this case), three employees of NHI, and a notary public. A court reporter recorded each witness' testimony. At the expiration of its term the grand jury was discharged without having voted whether or not to indict petitioners (Pet. App. 2a).

On October 15, 1975, a second grand jury indicted petitioners for violations of 18 U.S.C. 371, 1001, and 2. The evidence presented to this grand jury was not transcribed. It consisted of a summary by Agent Crowley of the testimony given before the first grand jury (including his own), supporting documentary evidence, and responses by Agent Crowley to questions from the grand jurors. On petitioners' motion the district court dismissed the indictment because the testimony consisted of hearsay and was not transcribed (Pet. App. 2a-3a).

A third grand jury was convened on April 15, 1976. With a court reporter present, the government presented evidence upon which the grand jury indicted petitioners on three counts of conspiracy to make and the making of false, fictitious, or fraudulent statements in a matter before a department or agency of the United States, in violation of 18

U.S.C. 371, 1001, and 2. This time Agent Crowley read to the grand jury transcripts of the sworn testimony given before the first grand jury, presented documentary evidence, and answered questions from the grand jurors. Before presenting this evidence the government apprised the grand jury of the existence of exculpatory matters, including evidence tending to impeach the credibility of some of its witnesses (Pet. App. 10a-11a). The district court dismissed this indictment as well, ruling that, since the first grand jury had heard live testimony, a subsequent grand jury had to be given the same opportunity before it could return an indictment (Pet. App. 3a-4a).

On the government's appeal, the court of appeals reversed and reinstated the indictment, holding that "[r]eading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute, on the facts of this case, 'fundamental unfairness' or a threat to 'the integrity of the judicial process' " (Pet. App. 10a). The court also ruled "that by dismissing the indictment the district judge overstepped the bounds of his [supervisory] authority and improperly interfered with decisions within the domain of the prosecutor" (*id.* at 4a).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's dismissal of the indictment on grounds of governmental misconduct in the manner in which it presented evidence to the grand jury. That reversal puts petitioners in the same position as if the district court had denied their motion in the first instance. Such a denial would not have been subject to interlocutory appeal (see *Cobbledick* v. *United States*, 309 U.S. 323; *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327), and there is no reason for this Court to grant interlocutory review of the

court of appeals' decision. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, any of petitioners are convicted and their convictions are affirmed, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals, upon whose opinion we principally rely, correctly reversed the district court's dismissal of the indictment. Petitioners erroneously assert (Pet. 8-9) that it was "fundamentally unfair" for the government to have Agent Crowley read transcripts of sworn testimony given by three witnesses[1] before the first grand jury, rather than to call those witnesses anew. The gist of petitioners' argument is that the credibility of two of those witnesses was suspect and that the grand jurors should have been able to observe their demeanor. But the grand jury was, in fact, informed that these witnesses had given prior inconsistent statements, and there can be no suggestion here that the government followed the course it did in order to hide anything from the grand jury. Furthermore, Agent Crowley gave live testimony, supplied supporting documents, and was available to answer questions.

Moreover, the fact that some of the evidence took the form of hearsay did not invalidate the indictment. In *Costello* v. *United States*, 350 U.S. 359, 363, this Court ruled:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.[2]

[1]The testimony of the fifth witness who appeared before the first grand jury (the notary public) was not read because it lacked substantive value (Pet. App. 3a, n. 1).

3. Petitioners also assert (Pet. 9-11) that the court of appeals applied an incorrect standard of review in assessing the propriety of the district court's dismissal of the indictment in this case. In petitioners' view, the decision below erroneously "confines proper judicial intervention [in matters involving the grand jury] to an exceedingly small class of cases, *i.e.*, those where the conduct in question *requires* dismissal of the indictment" (Pet. 11; emphasis in original). We know of no authority that would permit a district court to dismiss an indictment when it was *not* required, or that would compel a court of appeals to accept a district court's dismissal at face value. Contrary to petitioners' claim, the decision below

[2]This Court has consistently reaffirmed the principles of *Costello*. See *United States* v. *Calandra*, 414 U.S. 338, 345 ("[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, * * * or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, *Lawn* v. *United States*, 355 U.S. 339 (1958)."). Indeed, indictments have been upheld even where the prosecutor concealed evidence which would undermine a witness' credibility, since at the trial on the merits the defendant will have the opportunity "to expose all the facts bearing upon his guilt or innocence." *Loraine* v. *United States*, 396 F. 2d 335, 339 (C.A. 9), certiorari denied, 393 U.S. 933.

does not constitute an "abdication of the judicial function" (Pet. 11). Rather, it represents a recognition by the court of appeals that "[j]udges are not free * * * to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' " *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 7 (quoting from *Rochin* v. *California*, 342 U.S. 165, 170).

The decisions from the Second Circuit cited by petitioners (Pet. 9-10) do not conflict with the decision below. That line of decisions, culminating in *United States* v. *Estepa*, 471 F. 2d 1132, and representing exercises by the Second Circuit of its supervisory power, cautions federal prosecutors in that circuit to forego unnecessary reliance on hearsay evidence in the grand jury and to advise the grand jury that the evidence presented to it is hearsay when such is the case. In *Estepa* the court ordered an indictment dismissed when the prosecutor ignored the court's repeatedly expressed admonitions and when the grand jury had been misled about the hearsay nature of the evidence it had heard. The court ruled that the use of hearsay evidence was inappropriate only where the jury has been misled or when there is a " 'high probability that with [direct] rather than hearsay testimony the grand jury would not have indicted' " (*id.* at 1137). Here, by contrast, the grand jury was advised that it was hearing transcribed, sworn testimony from an earlier proceeding. It also knew that two of the witnesses whose testimony was read had earlier given prior inconsistent statements. It also heard the live testimony of Agent Crowley, the government official most familiar with the case. Thus, even applying the *Estepa* test, the jury was not misled and there was no "high probability" in this case that the grand jury would not have indicted had it heard live rather than hearsay testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
PATTY MERKAMP,
Attorneys.

SEPTEMBER 1977.